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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PETROLEUM HELICOPTERS, INC.,
Petitioner,

v.

CAROL T. SINCOX, individually and as natural tutrix of the minors, Byron Sincox, etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 17, 1985

QUESTION PRESENTED

Whether the court of appeals erred in holding, contrary to the decisions of three other courts of appeals, that the Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1982), does not preempt the application of state wrongful death statutes to accidents on the high seas.*

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* The only parties to the proceeding in the Court of Appeals were Carol T. Sincox and Petroleum Helicopters, Inc. Ms. Sincox appeared in the court below both individually and as the natural tutrix of her minor children, Byron Sincox and Darin J. Hebert. Petitioner Petroleum Helicopters, Inc. is a subsidiary of Offshore Navigation, Inc., has no subsidiaries that are not wholly owned, and has the following affiliates: Arabian Helicopters, Int'l; Arabian Helicopters, Ltd.; Corporacion de Servicios Dzunum, S.A. de C.V.; Ecuavia Oriente, S.A.; Evangeline Airmotive, Inc.; International Helicopter Transport, Inc.; and Petroleum Helicopter de Bolivia, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not reported. The order of the district court (Pet. App. 3a) was issued without opinion. The opinion of the court of appeals in *Tallentire* v. *Offshore Logistics, Inc.* (Pet. App. 4a-33a) is reported at 754 F.2d 1274 (5th Cir. 1985).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 22, 1985. A timely suggestion for rehearing *en banc* was denied on April 18, 1985 (Pet. App. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

The Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1982), and Louisiana's wrongful death statute, La. Civ. Code Ann. art. 2315 (Supp. 1985), are reproduced at Pet. App. 34a-37a.

STATEMENT

On April 4, 1984, Michael E. Sincox was killed in a helicopter accident while travelling between offshore oil and gas drilling platforms in the Gulf of Mexico. R.E. 38.[1] The accident occurred more than 100 miles from the shore of any state. Plaintiff Carol T. Sincox, decedent's widow and a Louisiana resident, brought a wrongful death suit[2] against petitioner, Petroleum Helicopters, Inc., the owner and operator of the helicopter. Plaintiff also sued three corporations that were allegedly engaged in the manufacture of the helicopter.[3]

Petitioner moved to dismiss all of plaintiff's claims except those under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-767 (1982). R.E. 23. Plaintiff responded that the loss of her husband should be redressed under Louisiana's wrongful death statute, La. Civ. Code Ann. art. 2315 (Supp. 1985), which, she urged, would apply by operation of § 1333 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S. § 1333 (1982). R.E. 39.

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[1] Citation is to the "Record Excerpts" filed in the court of appeals.

[2] Wrongful death suits seek recovery for harm suffered by the decedent's family as a result of his or her death. By contrast, survival actions permit the decedent's estate to prosecute any claims for personal injury that the decedent would have had, but for his death. See *Sea-Land Service, Inc.* v. *Gaudet*, 414 U.S. 573, 575 n.2 (1974). Plaintiff also brought a survival action as administratrix of her husband's estate. The issues raised by that claim, which remains pending in the district court, are not involved in this petition.

[3] Societe Nationale Industrielle Aerospatiale; Aerospatiale Helicopter Corp.; and Detroit Diesel Allison, a Division of General Motors Corporation. R.E. 7.

The district court dismissed plaintiff's claims under OCSLA and the Louisiana wrongful death statute, leaving for trial her claims under DOHSA. R.E. 68.[4] The practical effect of this ruling was that the measure of plaintiff's damages would be fixed by Section 2 of DOHSA, 46 U.S.C. § 762, which limits recovery to "pecuniary loss," rather than by Louisiana's wrongful death statute, which allows recovery for nonpecuniary losses, including "loss of consortium, service, and society." La. Civ. Code Ann. art. 2315(B). In result, plaintiff noticed an interlocutory appeal to the Fifth Circuit pursuant to 28 U.S.C. § 1292(a)(3) (1982) (admiralty interlocutory appeals). R.E. 69.

While plaintiff Sincox's appeal was pending, the court of appeals decided a conceptually identical case, *Tallentire* v. *Offshore Logistics, Inc.*, 754 F.2d 1274 (5th Cir. 1985) (Pet. App. 4a-33a). The court in *Tallentire* rejected claims of federal preemption and ruled that Louisiana's wrongful death statute, by its own force, could fix the measure of recovery for accidents occurring beyond the three-mile limit, notwithstanding DOHSA's narrower measure of recovery for such accidents.[5] *Id.* at 1282;

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[4] The district court's reasons for dismissing the claims under OCSLA are not recorded. Based on then existing precedent, petitioner urged the district court to dismiss those claims because OCSLA applies to accidents on oil rig platforms, but not to accidents that occur on or over the high seas and are subject to traditional admiralty jurisdiction. R.E. 28. See *Smith* v. *Pan Air Corp.*, 684 F.2d 1102, 1108-12 (5th Cir. 1982). Dismissal was also proper under the court of appeals' intervening decision in *Tallentire* v. *Offshore Logistics, Inc.*, 754 F.2d 1274, 1279 (5th Cir. 1985) (Pet. App. 10a), which held that OCSLA "would not permit recovery of non-pecuniary damages via the Louisiana statute" because the state statute is inconsistent with the DOHSA remedy.

[5] DOHSA applies to deaths caused by accidents more than one marine league (three nautical miles) from shore. 46 U.S.C. § 761. The waters less than one marine league from shore are often called "territorial waters"; those beyond are called the "high seas."

Pet. App. 16a. One week later the court of appeals ordered the district court to reconsider its dismissal of plaintiff Sincox's claims under the Louisiana wrongful death statute, because "[i]n Tallentire we held that a remedy under the Death on the High Seas Act could be supplemented by a state's wrongful death statute." Pet. App. 1a.

The *Tallentire* decision is based on a sharply divided panel's interpretation of Section 7 of DOHSA.[6] That section provides:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 U.S.C. § 767.

In *Tallentire*, the defendant urged that Section 7 simply preserves state law remedies for wrongful deaths occurring in territorial waters, where DOHSA does not apply. The panel concluded, however, that Section 7 also preserves state law remedies in cases involving accidents on the high seas, where DOHSA does apply. 754 F.2d at 1282; Pet. App. 16a. The majority noted particularly that in a last-minute amendment, proposed by Representative Mann, the following clause was deleted from the end of the first sentence of Section 7: "as to causes of action accruing within the territorial limits of any State." The majority did not, however, reach any conclusion as to the intent behind the passage of this amendment, suggesting that to do so would be "hopeless" and "unnecessary in light of the clear language of the statute." *Id.* at 1282; Pet. App. 16a.

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[6] Judge Davis wrote for the panel majority, with Judge Jolly specially concurring and Judge Garza dissenting.

In holding that DOHSA does not preempt state statutes that provide rights and remedies for wrongful death on the high seas, the *Tallentire* court acknowledged that its ruling conflicted with the Ninth Circuit's holding in *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983). 754 F.2d at 1283; Pet. App. 20a. Elsewhere the court took note of six other decisions concluding that DOHSA preempts invocation of state wrongful death statutes for accidents occurring on the high seas. 754 F.2d at 1280 n.10; Pet. App. 12a n.10. The *Tallentire* panel also acknowledged that its ruling would produce an anomalous result: federal maritime law would provide the exclusive remedy for wrongful deaths in the territorial waters adjacent to Louisiana, but Louisiana law or any other state's law could apply to wrongful deaths on the high seas. *Id.* at 1284; Pet. App. 21a.

Judge Davis articulated profound reservations for the *Tallentire* majority:

> "Our holding in this case does not promote the uniformity in the maritime law which the Supreme Court has nurtured for many decades, and we may agree with our brothers of the Ninth Circuit that to have state law preempted in territorial waters yet operative on the high seas is 'a result as damaging to uniformity in wrongful death actions as it is illogical.' [*Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983)]. It is indeed profoundly unsettling that state law will have nothing to do with a claim for wrongful death which occurs on the Mississippi River, yet might apply to the death of an offshore worker forty miles from land * * *." 754 F.2d at 1284; Pet. App. 20a-21a.

Judge Jolly, specially concurring, put his reservations even more strongly:

> "The result we reach in this case creates significant problems in the field of maritime law because it defies reason, runs contrary to principles of the gen-

eral precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas." *Id.* at 1289; Pet. App. 31a-32a.

Judge Garza, in dissent, concluded that Congress intended that the federal remedy be the exclusive remedy for wrongful deaths on the high seas. He echoed the majority's concern that any other result would be " 'as damaging to uniformity in wrongful death actions as it is illogical.' " *Id.* at 1289; Pet. App. 33a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH LONG-STANDING DECISIONS OF OTHER COURTS OF APPEALS AND DISTRICT COURTS ON AN IMPORTANT ISSUE CENTRAL TO THE UNIFORM ADMINISTRATION OF MARITIME LAW

In *Tallentire*, the Fifth Circuit created an important issue of federal preemption in maritime law by holding that the Death on the High Seas Act does not preempt the application of state wrongful death statutes to accidents on the high seas. In this case, the court of appeals directed the district court to follow *Tallentire*, and thus to allow Louisiana law to "supplement" the federal remedy for death on the high seas. That ruling warrants review by this Court because (1) it conflicts with the long-settled decisions of three other courts of appeals and numerous district courts and with this Court's express approval of the most prominent of those cases; (2) it is based on the Fifth Circuit's mistaken view of the intent of the Sixty-Sixth Congress in enacting Section 7 of DOHSA; and (3) by allowing state wrongful death statutes to supplement the uniform federal remedy, it runs counter to the principle of uniformity in maritime law and resurrects jurisprudential problems put to rest by this Court some 15 years ago.

1. The Decision Below Conflicts With That Reached By Other Courts, Including Three Courts Of Appeals.

The Fifth Circuit's construction of Section 7 of DOHSA is in direct conflict with rulings by three other Circuits and various district courts. The landmark construction of Section 7 was made more than thirty years ago in *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1954). Examining first the state of maritime law in 1920, the *Wilson* court concluded that the principal impetus for the enactment of DOHSA was that, in a given case, either there was no remedy at all for wrongful death on the high seas or there were almost insuperable problems in choosing and applying the state laws that purportedly furnished such a remedy. *Id.* at 87-88. The court then analyzed the legislative history and purposes of Section 7, including especially the last-minute Mann Amendment. The court noted that as originally written Section 7 had plainly provided that the DOHSA remedy would be exclusive; speeches relating to the Mann Amendment, moreover, showed that other members of the House believed that the amendment would not undermine the exclusivity of the DOHSA remedy, either because enactment of DOHSA would occupy the field entirely or because state remedies would, even absent an express preemption, be considered inconsistent with the Act's fundamental purpose of providing a uniform remedy. The *Wilson* court thus concluded that, in light of the policies favoring exclusivity of the federal remedy and in accordance with the then "unanimous" body of case law and commentary, DOHSA must be read to preempt state wrongful death statutes for accidents occurring on the high seas.

In the wake of *Wilson*, the First, Third, and Ninth Circuits have concluded that DOHSA preempts state wrongful death statutes for accidents occurring on the high seas. See *Barbe* v. *Drummond*, 507 F.2d 794, 801 n.10 (1st Cir. 1974) ("It would be possible to interpret

this section [Section 7 of DOHSA] to allow a state wrongful death statute to operate where the death occurs on the high seas, but the better authority rejects this view * * *."); *Dugas* v. *National Aircraft Corp.*, 438 F.2d 1386, 1388-91 (3d Cir. 1971) ("Courts have clearly held that the need for uniformity requires that [DOHSA] supersede any state wrongful death statute."); *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983) ("where it is applicable, the Death on the High Seas Act preempts state wrongful death statutes," for a contrary result would be "illogical" and "damaging to uniformity"). The decisions of these courts of appeals, moreover, accord with numerous district court decisions of the past 50 years and with the views of the commentators.[7]

This Court has also treated the decisions in *Wilson* and *Barbe* as providing the authoritative construction of

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[7] *E.g.*, Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 Colum. L. Rev. 648, 651 & n.16 (1964); Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 Yale L.J. 395, 422-23 (1935); *Canillas* v. *Joseph H. Carter, Inc.*, 280 F. Supp. 48, 51 (S.D.N.Y. 1968); *Jennings* v. *Goodyear Aircraft Corp.*, 227 F. Supp. 246, 247-48 (D. Del. 1964); *Devlin* v. *Flying Tiger Lines, Inc.*, 220 F. Supp. 924, 927 (S.D.N.Y. 1963); *Noel* v. *United Aircraft Corp.*, 204 F. Supp. 929, 930-33 (D. Del. 1962); *Blumenthal* v. *United States*, 189 F. Supp. 439, 446 (E.D. Pa. 1960), *aff'd*, 306 F.2d 16 (3d Cir. 1962); *First Nat'l Bank* v. *National Airlines, Inc.*, 171 F. Supp. 528, 536 (S.D.N.Y. 1958), *aff'd*, 288 F.2d 621 (2d Cir. 1961); *King* v. *Pan American World Airways*, 166 F. Supp. 136, 139 (N.D. Cal. 1958), *aff'd*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960); *Batkiewicz* v. *Seas Shipping Co.*, 53 F. Supp. 802, 804 (S.D.N.Y. 1943); *Echavarria* v. *Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677, 678 (E.D.N.Y. 1935); see also cases and articles cited in *Wilson, supra*, 121 F. Supp. at 91 n.22.

But see *In re Complaint of Exxon Corp.*, 548 F. Supp. 977 (S.D. N.Y. 1982); *Alexander* v. *United Technologies Corp.*, 548 F. Supp. 139 (D. Conn. 1982); *Rairigh* v. *Erlbeck*, 488 F. Supp. 865 (D. Md. 1980); *Lowe* v. *Trans World Airlines, Inc.*, 396 F. Supp. 9 (S.D.N.Y. 1975); *Safir* v. *Compagnie Generale Transatlantique*, 241 F. Supp. 501 (E.D.N.Y. 1965).

Section 7 of DOHSA. In *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), this Court held that the wrongful death remedy provided by DOHSA—"fair and just compensation for the pecuniary loss"—could not be supplemented by the more generous remedy for nonpecuniary losses provided under "general maritime principles." The Court based its decision in part on *Wilson*'s and *Barbe*'s express conclusion that, notwithstanding Section 7, the federal remedy provided for under DOHSA cannot be supplemented by state wrongful death statutes. Thus, this Court said:

> "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements. See generally *Barbe* v. *Drummond*, 507 F.2d 794, 801 n.10 (CA1 1974); *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85 (ND Cal. 1954)." 436 U.S. at 625.

Moreover, the Court in *Higginbotham* recognized that the maritime rules relating to wrongful death are "national" rules and that in light of its decision there would be "one national rule [applying] to fatalities in territorial waters and a slightly narrower national rule [applying] to accidents farther from land." *Id.* at 624 n.18.

Ironically, even the Fifth Circuit has held that DOHSA provides the exclusive remedy for wrongful death on the high seas. See *Dore* v. *Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968), *rev'd on other grounds sub nom. Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Lockwood* v. *Astronautics Flying Club, Inc.*, 437 F.2d 437 (5th Cir. 1971). But, in reversing its position in *Tallentire* and in this case, the Fifth Circuit has now created a square conflict with three other Circuits and numerous district courts.

2. The Decision Below Places An Erroneous Construction On Section 7 Of DOHSA.

The *Tallentire* panel placed unduly great, if not conclusive, weight on what it said was the "clear language of the statute" (754 F.2d at 1282; Pet. App. 16a), and

hence misconstrued Section 7 of DOHSA. While the court felt compelled to reach a "damaging" and "illogical" result, the many decisions reaching an opposite result demonstrate that the language of Section 7 is not a "clear" command to embrace the Fifth Circuit's construction. In fact the panel admitted as much, citing as "prophetic[]" one Congressman's remark during the debate that "the effect of the [Mann] amendment would be to leave the sentence incomplete and the remaining language, not unlike Mahomet's coffin, suspended between heaven and earth, having no application to anything in particular." 754 F.2d at 1280 n.9; Pet. App. 12a n.9.

Further, in considering the legislative history, the court failed to appreciate the historical context in which DOHSA was enacted. As explained by the *Wilson* court, enactment of federal legislation governing wrongful deaths on the high seas was prompted by a felt need for a uniform remedy, by widespread doubts whether state legislatures had the requisite legislative jurisdiction to provide remedies, and by the significant difficulties encountered in litigating those cases where state laws purported to be applicable. 121 F. Supp. at 87-88. In fact, just three years prior to the enactment of DOHSA, this Court had stated in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 215 (1917), that "[i]t certainly could not have been intended [by those drafting the Constitution] to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed * * *."

Moreover, as the *Wilson* opinion explained, the DOHSA legislation of 1920 was the product of a political compromise, carefully worked out over almost ten years, between those persons favoring an exclusive federal remedy for all maritime accidents and the local bars of the maritime states which favored applying local law.

This compromise was direct and simple: DOHSA would create an exclusive federal remedy on the high seas but would leave to state law all accidents occurring in territorial waters. See 121 F. Supp. at 89.

The terms of the compromise and the purposes of DOHSA were plainly set forth in the Committee Reports for both Houses:

> "*The right [of action] is made exclusive for deaths on the high seas*, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States. * * *
>
> "Section 7 makes the act the law of the courts of admiralty of the United States, and, *so far as the high seas are concerned, makes the remedy exclusive.* This is for the purpose of uniformity, as *the States can not properly legislate for the high seas.* * * *
>
> "There is no reason why the admiralty law of the United States should [any] longer depend on the statute laws of the States * * *." S. Rep. No. 216, 66th Cong., 1st Sess. 3, 4 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess. 3, 4 (1920) (emphasis added).

Given these considerations, the court below attached too much weight to the idiosyncratic views of Representative Mann and misconstrued the effect of his last minute amendment. As this Court has repeatedly emphasized, the remarks of a single member of Congress, even a bill's sponsor, are by no means controlling; rather, they "must be considered with the Reports of both Houses and the statements of other Congressmen." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979); see also *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). As discussed in detail by the *Wilson* court, 121 F. Supp. at 90, and conceded in *Tallentire*, 754 F.2d at 1280-81, there is ample proof that other members of Congress believed that Representative Mann's amendment would not alter the exclusivity of

the federal remedy on the high seas, either because the states would be powerless to act once Congress had occupied the field or because state remedies would be considered inconsistent with the fundamental purpose of the Act to provide a uniform remedy.

In short, the court below placed an aberrant construction on Section 7 that is inconsistent with the purpose of the Act—to provide a uniform, federal remedy—and with the political compromise that brought the Act into being.

3. The Decision Below Frustrates The Principle Of Uniformity In Maritime Law By Permitting State Statutes To Apply To Wrongful Deaths On The High Seas.

If allowed to stand, the rulings of the court below in *Tallentire* and in this case will undermine the principle of uniformity in maritime law as it applies to wrongful deaths on the high seas. The special importance of that principle in maritime law has long been recognized by this Court:

> "Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. * * *' *The Lottawanna*, 21 Wall. 558, 574, 575 [1875]." *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 160-61 (1920).

When principles of uniformity have been abandoned in favor of state law, moreover, it has resulted in abundant unhappy experiences for this Court and the admiralty

courts. Those experiences commenced when this Court held in 1886 that the general maritime law of the United States provided no remedy for wrongful deaths on the high seas or in territorial waters. *The Harrisburg*, 119 U.S. 199 (1886). For more than 80 years, admiralty courts struggled to apply state law to deaths occurring in territorial waters.[8] These efforts produced "confusion" and "incongruity" in this Court's words,[9] or a "jurisprudential disaster" in the words of Professors Gilmore and Black.[10] By either account, a change was needed.

In 1970 this Court responded by overruling *The Harrisburg* and holding that general federal maritime law furnishes a remedy for deaths occurring in territorial waters. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). This ruling was necessary to "assure uniform vindication of federal policies [and] remov[e] the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 401. The Court thus affirmed that "[f]ederal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." *Id.* at 401 & n.15. Uniformity within territorial waters, said the Court, "not only will further the concerns of both the 1920 Acts [DOHSA and the Jones Act] but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Id.* at 402 (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)).

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[8] Similar difficulties respecting deaths on the high seas were resolved by Congress in 1920, when it enacted DOHSA.

[9] *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 378, 395 (1970).

[10] G. Gilmore & C. Black, *The Law of Admiralty* 365-67 (2d ed. 1975).

Since the *Moragne* decision, lower courts, including the Fifth Circuit, have held that the federal maritime law remedy recognized in *Moragne* entirely displaces the various states' wrongful death statutes that formerly applied to deaths in territorial waters, thus resolving the "jurisprudential disaster" involved in applying state laws. See *In re S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976); *Nelson* v. *United States*, 639 F.2d 469 (9th Cir. 1980). But now, according to *Tallentire* and the decision below, those same state wrongful death statutes may be applied if the accident occurs more than one marine league from shore. In short, the decision below runs counter to the essential uniformity of federal maritime law and resurrects problems put to rest by this Court 15 years ago.[11]

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[11] That the decision below frustrates the principle of uniformity and creates manifestly undesirable results not only shows the importance of the question presented by this petition but also establishes a further reason for accepting the traditional construction of Section 7. This Court in construing statutes has emphasized that "we cannot attribute to Congress the intention to * * * open the door to such obvious incongruities and undesirable possibilities." *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 776 (1983); *accord, American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982).

CONCLUSION

In light of the importance of the substantive ruling in *Tallentire* and this case, the conflict among the Circuits with respect to the meaning of an important federal statute, and the special need for uniformity of maritime law, this Court should grant certiorari to review the question presented by petitioner.

Respectfully submitted,

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July 17, 1985

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4639

Summary Calendar

CAROL T. SINCOX, Individually, and as natural tutrix of the minors, BYRON SINCOX, etc.,
Plaintiff-Appellant,

versus

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(March 22, 1985)

Before WILLIAMS, JOLLY and HILL, Circuit Judges.

PER CURIAM:*

While the appeal in this case was pending, we decided *Tallentire v. Offshore Logistics, Inc.*, No. 83-3296, slip op. at 3061 (5th Cir. March 15, 1985). In Tallentire, we held that a remedy under the Death on the High Seas Act could be supplemented by a state's wrongful death statute. Accordingly, this case is remanded to the district court for reconsideration in the light of *Tallentire*.

REMANDED.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4639

CAROL T. SINCOX, Individually and as natural tutrix of the minors, BYRON SINCOX, Etc.,
Plaintiff-Appellant,

versus

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 3/22/85, 5 Cir., 198- , —— F.2d ——)

(April 18, 1985)

Before WILLIAMS, JOLLY and HILL, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

SEPTEMBER 18, 1984

PRESENT: HON. JOHN M. SHAW, Judge, Presiding
MILDRED BAKER, Minute Clerk

COURT OPENED: 9:30 AM COURT ADJOURNED: 11:00 AM

MINUTES OF COURT

Case No. 84-1051
Section O

CAROL T. SINCOX, *et al.*

vs.

PETROLEUM HELICOPTERS, INC.

APPEARANCES

DANNY LIRETTE for Plaintiffs
VANCE E. ELLEFSON for Petroleum Helicopters, Inc.

CASE CALLED FOR

Hearing on motions

VERDICT, RULING, COMMENTS:

Motion on behalf of Petroleum Helicopters for judgment on the pleadings argued, submitted and GRANTED as to Art. 2315 and Outer Continental Shelf Lands Act claims. Plaintiffs' remaining claims lie under DOHSA and the General Maritime Law. Counsel for plaintiffs conceded that there is no diversity and trial will be before the Judge, not a jury.

Plaintiffs' request that the interlocutory judgment be certified for appeal under 28 U.S.C.A. 1292(b) is denied.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 83-3296, 83-3328

BETH A. TALLENTIRE,
Plaintiff-Appellant,

v.

OFFSHORE LOGISTICS, INC., *et al.*,
Defendants,

AIR LOGISTICS,
Defendant-Appellee.

CORINE ANN SOUDELIER TAYLOR, Individually,
as administratrix of the estate of MICHAEL JOHN TAYLOR,
and as natural tutrix of the minor, LESLIE ANN TAYLOR,
Plaintiff-Appellant Cross-Appellee,

v.

BELL HELICOPTER TEXTRON, a DIVISION OF TEXTRON, INC.,
Defendant.

CORINE ANN SOUDELIER TAYLOR, ETC.,
Plaintiff-Appellant Cross-Appellee,

v.

AIR LOGISTICS, INC.,
Defendant-Appellee Cross-Appellant,

v.

HALLIBURTON SERVICES,
Intervenor-Appellee.

March 15, 1985

Davidson, Meaux, Sonnier & McElligott, V. Farley Sonnier, Lafayette, La., for plaintiffs-appellants.

Phelps, Dunbar, Marks, Claverie & Sims, Howard Daigle, Jr., New Orleans, La., for Air Logistics.

Charles Hanemann, Houma, La., for Taylor.

Ronald A. Johnson, Johnson & McAlpine, New Orleans, La., for Halliburton Serv.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARZA, JOLLY and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

These consolidated cases stem from the death of two offshore workers in the crash of a helicopter some thirty miles off the Louisiana coast. The helicopter was owned and operated by Air Logistics, a division of Offshore Logistics, Inc., and was manufactured by Bell Helicopter, a division of Textron, Inc. Air Logistics is a division of Offshore Logistics, a Louisiana corporation, (hereafter referred to as Air Logistics); Bell is a Delaware corporation with its principal place of business in Rhode Island. Both actions included claims under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 et seq., the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq., and the law of Louisiana. The district court held that DOHSA furnished Taylor and Tallentire with their exclusive remedy. Air Logistics admitted liability. Bell did not admit liability, but agreed to pay any judgment which Air Logistics was unable to satisfy. Pursuant to the trial judge's pretrial ruling restricting the claims to those arising under DOHSA, and striking all claims founded on Louisiana law, trial was devoted solely to the issue of damages under DOHSA. No evidence of Bell's liability was introduced at trial, and no party appeals the judgment in its favor, thus the only defendant before us is Air Logistics.

In this appeal, Taylor and Tallentire press a common claim that Louisiana's wrongful death statute applies to this helicopter crash on the high seas, either of its own force or as adopted federal law through section 1333 of OCSLA. In view of the clear mandate of section 7 of DOHSA reserving to litigants their rights of recovery under state wrongful death acts, we reverse the district court's denial of benefits recoverable under Louisiana law.

I. APPLICABILITY OF STATE WRONGFUL DEATH STATUTES TO HIGH SEAS DEATHS

A. BACKGROUND

Today we are invited to make further adjustments in the volatile field of maritime wrongful death and for the sake of clarity, our analysis of the subject requires a brief historical discussion.

The jurisprudential and legislative saga leading to this decision began almost a century ago when the Supreme Court held in *THE HARRISBURG*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886) that the general maritime law of the United States afforded no remedy for wrongful death. The admiralty courts were not entirely stymied by this forced parsimony and state wrongful death acts, if available, were enforced in admiralty to allow recovery in wrongful death cases.[1] This practice was approved by the Supreme Court in the case of a high seas death in *THE HAMILTON*, 207 U.S. 398, 52 L.Ed. 264, 28 S.Ct. 133 (1907). Though the admiralty courts were disposed to grant a remedy when one could be fashioned,[2] in the

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[1] *See, e.g. Southern Pacific Co. v. De Valle Da Costa*, 190 Fed. 689 (1st Cir. 1911); *International Navigation Co. v. Lindstrom*, 123 Fed. 475 (2d Cir. 1903); *The City of Norwalk*, 55 F. 98 (S.D.N.Y. 1893).

[2] See the often-quoted passage from Chief Justice Chase's opinion in *THE SEA GULL*, 21 F.Cas. No. 12,578 p. 909 (C.C.Md. 1865):

> [T]here are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representa-

case of high seas deaths the coverage supplied by state statutes was not uniform, and did not adequately fill the void left by *THE HARRISBURG*. This is one of the considerations which led to the passage in 1920 of DOHSA and its companion legislation, the Jones Act (currently codified at 46 U.S.C. § 688 et seq.) *See Moragne v. States Marine Lines*, 398 U.S. 375, 393-94, 90 S.Ct. 1772, 1783-84, 26 L.Ed.2d 339, 351-53 (1970). Section 1 of DOHSA provides:

> Whenever the death of a person shall be caused by a wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if the death had not ensued.

46 U.S.C. § 761.

After 1920, DOHSA supplied a uniform remedy for deaths occurring over a marine league from shore; within territorial waters, after some initial confusion, state statutes continued to hold sway.[3] The evolution of maritime wrongful death remedies continued in 1970 with

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> tive for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, . . . and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.

Id. at 910.

[3] *See, e.g. Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); *THE TUNGUS v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959).

Moragne v. States Marine Lines, in which the Supreme Court overruled *THE HARRISBURG* and established a remedy for wrongful death grounded in the general maritime law of the United States. Six years later, this circuit held in *In re S/S HELENA*, 529 F.2d 744, 753 (5th Cir. 1976), that after *Moragne* there was no longer any reason for admiralty courts to apply state wrongful death acts in territorial waters. A further critical development occurred in 1978 with *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), in which the Supreme Court held that damages recoverable under DOHSA may not be supplemented by the *Moragne* death remedy. Generally, in post-*Higginbotham* actions by survivors of non-seamen, this circuit was left with the *Moragne* remedy supreme in territorial waters, DOHSA supreme on the high seas, and state statutes, it was strongly hinted, out of the picture altogether.[4]

The problem we have before us now arises because DOHSA permits recovery of only pecuniary damages—lost wages, loss of services, and the like.[5] Many state wrongful death acts, including Article 2315 of the Louisiana Civil Code, allow recovery for non-pecuniary losses such as loss of love and affection. In an effort to recover these non-pecuniary losses, Taylor and Tallentire offer two alternative theories under which the Louisiana statute could apply to their actions. The first is that Article 2315 applies through section 1333 of OCSLA. The second is that DOHSA does not preempt state wrongful death acts, and Article 2315 grants them rights of its

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[4] *See Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384 n. 6 (5th Cir. 1983) (DOHSA likely preempts state wrongful death remedies; citing *Higginbotham*).

[5] 46 U.S.C. § 762:

> [T]he recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . .

own force as state law. We address each of these contentions in turn.[6]

B. APPLICATION OF LOUISIANA LAW THROUGH § 1333 OF OCSLA

"The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in question here on the outer Continental Shelf." *Rodrigue v. Aetna Casualty & Surety*

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[6] Before venturing into the merits, we note the bases for federal jurisdiction to consider wrongful death claims asserted under Louisiana law by Taylor and Tallentire. In the Tallentire case, there appear to be two separate bases for federal court jurisdiction at the time the suit was filed: (1) diversity of citizenship, since Beth Tallentire is a citizen of Pennsylvania and thus diverse as to both Air Logistics and Bell Helicopter; and (2) admiralty jurisdiction, since the helicopter ferrying the decedents ashore crashed on navigable waters. *LeDoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824, 824 (5th Cir. 1980).

In the Taylor case, since the plaintiff and Air Logistics are both Louisiana residents, the sole jurisdictional base present is admiralty jurisdiction under *LeDoux*.

Assuming the existence of a right of action under the Louisiana statute, the federal court has in any case the power to decide this state law claim under its pendent jurisdiction. A DOHSA claim and an article 2315 claim are obviously of the sort that, if considered without regard to their state or federal character, would ordinarily be expected to be tried in one judicial proceeding. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). The decision to exercise pendent jurisdiction is of course a matter of discretion, but when, as here, the considerations of judicial economy and convenience would be served, adjudication of state law claims is to be expected. *Hagans v. Lavine*, 415 U.S. 528, 545-46, 94 S.Ct. 1372, 1383, 39 L.Ed.2d 577 (1974). A federal court may exercise its pendent jurisdiction over state law claims when the jurisdictional base of the main claim is in admiralty. *E.g. Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1208 n. 4 (6th Cir. 1980). Since pendent jurisdiction over the Article 2315 claims will be available in any case, the primary effect of which jurisdictional theory is actually used will be on whether plaintiffs are entitled to a jury trial, a matter which is discussed infra.

Co., 395 U.S. 352, 355, 89 S.Ct. 1835, 1837, 23 L.Ed.2d 360, 364 (1969). Section 1333 of OCSLA adopts the law of the adjacent state, including tort law, as surrogate federal law for the area the act covers.[7] This provision was included in OCSLA in recognition of the fact that offshore workers were likely to have significant ties with adjacent states. Since the decedents in this case were platform workers, although their deaths did not occur on a platform, Taylor and Tallentire assert that OCSLA should apply.

Assuming that OCSLA does apply, it nonetheless would not permit recovery of non-pecuniary damages via the Louisiana statute. Section 1333 of OCSLA adopts state laws as surrogate federal law only "to the extent that they are applicable and not inconsistent with this subchapter *or other federal laws or regulations* . . . ." 43 U.S.C. § 1333 (emphasis added). It is established in

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[7] 43 § 1333:

> (a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
>
> (2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, . . .

43 U.S.C. § 1333 (emphasis in original).

this circuit that DOHSA applies to crash of a helicopter on the high seas, so Louisiana law could be adopted only to the extent it is not inconsistent with DOHSA.[8] This leaves the far more difficult question of whether state wrongful death statutes are preempted by DOHSA.

C. PREEMPTION OF STATE STATUTES BY DOHSA

The heart of this issue is the interpretation of section 7 of DOHSA:

> *The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.* Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

46 U.S.C. § 767 (emphasis added).

We begin with the proposition that section 7 is broad enough on its face to support Taylor and Tallentire's argument that if a state statute grants a right to recover for a high seas death, it is not preempted by DOHSA. As discussed more fully below, however, there has been considerable uncertainty over the effect of this seemingly simple provision. The heart of the debate over the interpretation of section 7, in turn, is the effect of the ill-starred "Mann Amendment."

As originally drafted, section 7 read "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any state . . .", 59 *Cong. Rec.* 4482 (1920), a formulation which would obviously allow DOHSA to pre-

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[8] *See Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111-12 (5th Cir. 1982); *see also Kimble v. Noble Drilling Corp.*, 416 F.2d 847, 850 (5th Cir. 1969), *cert. denied*, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970).

empt state remedies on the high seas. During floor debate on the bill, Representative Mann of Illinois introduced an amendment to strike the phrase "as to causes of action accruing within the territorial limits of any state," *id.* at 4484, leaving the provision in its present form. The debate at the time reflects considerable confusion among the members of Congress concerning the effect of the amendment, a confusion which is reflected over the next sixty years in the conflicting decisions of federal courts interpreting section 7.[9] A number of decisions interpret section 7 as Air Logistics would have us interpret it, to preserve state remedies only *in territorial waters.*[10] Other decisions take the opposite view, that section 7 is effective to preserve state remedies on the high seas as well.[11] The former position is based primarily on the belief, drawn from the floor debate, that regardless of what Representative Mann intended, Congress as a whole intended DOHSA to be an exclusive

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[9] Congressman Goodykoontz spoke more prophetically than he realized when he remarked during the debate that "the effect of the amendment would be to leave the sentence incomplete and the remaining language, not unlike Mahomet's coffin, suspended between heaven and earth, having no application to anything in particular." *Id.* at 4486.

[10] *See, e.g., Jennings v. Goodyear Aircraft Corp.*, 227 F.Supp. 246, 248 (D. Del. 1964); *Wilson v. Transocean Airlines*, 121 F.Supp. 85 (N.D. Cal. 1954). *See also Barbe v. Drummond*, 507 F.2d 794, 801 n. 10 (1st Cir. 1974); *Devlin v. Flying Tiger Lines, Inc.*, 220 F.Supp. 924 (S.D.N.Y. 1963). Other decisions state that DOHSA preempts state remedies without mentioning section 7 at all. *E.g., Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983); *Montgomery v. Goodyear Tire and Rubber Co.*, 231 F.Supp. 447, 452 (S.D.N.Y. 1964); *Blumenthal v. United States*, 189 F.Supp. 439, 446 (E.D. Pa. 1960).

[11] *See, e.g., In re Complaint of Exxon Corp.*, 548 F.Supp. 977, 978 (S.D.N.Y. 1982); *Alexander v. United Technologies Corp.*, 548 F.Supp. 139, 142 (D. Conn. 1982); *Rairigh v. Erlbeck*, 488 F.Supp. 865 (D. Md. 1980); *Safir v. Compagnie General Transatlantique*, 241 F.Supp. 501, 508 (E.D.N.Y. 1965). *Cf. Sierra v. Pan American World Airways*, 107 F.Supp. 519, 520-21 (D.P.R. 1952).

remedy. The case most frequently cited for this proposition is *Wilson v. Transocean Airlines*, 121 F.Supp. 85 (N.D.Cal. 1954), in which the court reviewed the legislative history of DOHSA in general, the Mann amendment in particular and concluded:

> [I]t is not at all clear that the subsequent approval of the amendment should be accepted as an indication that the intent of the Congress coincided with that of the amendment's author. It is equally likely that the approval of the amendment represented no more than the acceptance of what appeared to be an innocuous change in language to facilitate the immediate passage of the legislation. . . . An ambiguous and ill-considered amendment to the bill, which became the Act, is not [sufficient reason to ignore the original purpose of DOHSA.]

Id. at 90-91.

The congressional debate reflects a number of differing concerns and beliefs on the part of the legislators. These include whether the federal courts would have exclusive jurisdiction of DOHSA claims and whether causes of action granted by state statutes would be affected or preempted by DOHSA. The debate is not couched in the most precise legal terminology, and it appears that the term "jurisdiction" was used indiscriminately to refer to both the power of state or federal courts to hear a particular case and the power of a state to grant a right of recovery. Thus, at some points it is not entirely certain whether the subject of discussion is the power of state courts to hear DOHSA claims or the power of states to provide a remedy in addition to DOHSA. Some of the congressmen apparently believed that once Congress had legislated in this area, state statutes would be preempted regardless of any language to the contrary.[12] It is cer-

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[12] Mr. MONTAGUE. In reply to the statement of my colleague [Mr. Moore] I will say that jurisdiction upon this subject is

tain, however, that Representative Mann intended that if a state remedy was available, it would remain available.[13]

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found in the Constitution of the United States, and it has been held over and over again by our courts that when the Congress legislates in pursuance of constitutional authority such a law is exclusive. It requires no asservation in the bill to make it exclusive. It is exclusive by virtue of its superior jurisdiction; therefore, I submit, it is needless to amend this bill now and raise the chance of its defeat by adding a mere adjective when by the very force of the Constitution and the law in pursuance thereof it is inherently and necessarily exclusive.

Mr. VOLSTEAD. My impression is it would be exclusive upon the theory the gentlemen [Mr. Montague] suggests.

* * * *

Mr. VOLSTEAD. The view taken by the parties who drew this bill is that it is exclusive, because, as the gentleman from Virginia [Mr. Montague] pointed out, the power to pass laws on this subject is conferred on Congress in the Constitution, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject.

Mr. DEWALT. If that is true, as to that sort of accidents resulting in death, and if there be no doubt about that, according to the gentlemen from Virginia [Mr. Montague], and the gentleman's interpretation, and it being exclusive only as to matters occurring on the high seas, and also that the States have jurisdiction in regard to matters happening in their territorial limits, what is the use in having section 7?

59 Cong. Rec. at 4483-4485.

[13] Mr. MANN of Illinois. Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court. I may be wrong about that. I notice in the report in one place, on page 2, this statement from somebody:

> We are very anxious to have the bill go through in its present simple form, which avoids conflict with State

After a thorough review of the debate surrounding the Mann amendment to section 7, we agree with the court in *Wilson* that some members of Congress accepted the amendment so the bill could muster the necessary votes

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> statutes and yet remedies a crying defect in the maritime law as administered in this country—
>
> and so forth.
>
> *If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not.* In other words, if a man had cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court.
>
> * * * *
>
> Mr. SANDERS of Indiana. I would like to know what the effect of this law would be if the amendment offered by the gentleman from Illinois [Mr. Mann] be adopted with reference to this particular question: As thus amended, the first sentence in section 7 will read, "That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act." Now, as I understand it, if a person living in Illinois should be in the beneficiary class, should be, say, the widow of a person who had been killed on the high seas, that person may now bring action in personam in the State court of Illinois, and the damages recovered shall then be distributed in accordance with the provisions of the State statutes. Now, if this act is passed as thus amended, it will give that widow the right to elect as to whether she shall proceed under the terms of the act conferring jurisdiction upon the Federal courts with reference to this matter, or whether she shall proceed under the State statute of Illinois. Is that the gentleman's understanding?
>
> Mr. VOLSTEAD. That is my view of it, and my understanding is that in the form in which the bill at one time was drawn there was a provision something like this, and there was a precautionary clause added to prevent a double action; that is, to prevent action first in the State court and then afterwards an action in the Federal court.
>
> Mr. SANDERS of Indiana. The reason I raised the question is that you notice here that the action is for the benefit of the husband, parent, or child. My recollection of the action for

for passage. Nevertheless, the debate reflects an intent by the author of the amendment and others to preserve state remedies and the amendment carried the day. In this circumstance, an attempt to discern the congressional intent from the conflicting statements by participants in the debate is hopeless. It is also unnecessary in light of the clear language of the statute. Absent a clearly-expressed legislative intention to the contrary, the plain words of the statute must ordinarily be regarded as controlling. *Escondido Mutual Water v. LaJolla Indians*, —— U.S. -——, ——, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753, 761 (1984). Since the language of section 7 is clear, we conclude that a state statute which is effective to grant rights resulting from deaths on the high seas is not preempted by DOHSA.

Air Logistics advances five arguments why section 7 should not be given the interpretation we have given it. Each of these points deserves consideration, although ultimately none is persuasive.

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wrongful dealth in Illinois is that the child precedes the parent in the beneficial interest. It seems to me this might give conflicting rights. If the right of action were in one person in either case, then, of course, having elected to proceed under one provision, he would be barred from proceeding under the other provision. But suppose that the parent had the right to proceed in admiralty in the Federal courts under this law, and suppose under the State law of Illinois the child had the right to proceed. Now, how are you going to have an election in that case when the right to elect is not in the same person?

* * * *

Mr. MANN of Illinois. We give a certain class of rights under this act. If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be very critically examined.

* * * *

Mr. VOLSTEAD. It would be a good deal simpler if we should leave the statute in the form in which it is drawn.

Mr. MANN of Illinois. It would be a good deal wickeder.

59 Cong. Rec. at 4484-85 (emphasis added).

i. *Dore v. Link Belt Co.*

As an initial matter, Air Logistics argues that *Dore v. Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968), *reversed sub nom Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969) controls this case. In *Dore*, the survivors of a worker killed when he fell from an offshore platform contended, as do the plaintiffs in this case, that in addition to DOHSA they were entitled to invoke the Louisiana death statute either of itself or through OCSLA. This court rejected both contentions, holding that DOHSA was the plaintiff's sole remedy. 391 F.2d at 674-76. The Supreme Court granted certiorari and reversed, holding that since under the terms of OCSLA offshore drilling platforms were to be treated as federal enclaves located in an upland state, the case was not within the admiralty jurisdiction. Even if there were admiralty jurisdiction, DOHSA did not apply because Congress did not intend that result when it adopted the Lands Act. 395 U.S. at 365-66, 89 S.Ct. at 1842, 23 L.Ed.2d at 370. State law became federal law federally enforced as to platform accidents. There is no indication that the Court considered the circuit court holding that DOHSA preempts state statutes. It determined, however, that Louisiana law applied through OCSLA, and reversed the circuit court decision applying DOHSA to the exclusion of state statutes. We therefore do not consider the *Dore* opinion to control the issue of DOHSA's exclusivity when DOHSA does apply.

ii. *Mobil Oil Corporation v. Higginbotham*

A second argument put forward by Air Logistics is that the Supreme Court decision in *Mobil Oil Corp v. Higginbotham* forecloses supplementation of DOHSA by state statutes.[14] We disagree. *Higginbotham* dealt solely

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[14] Air Logistics relies on the following langauge:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been

with whether damages available under DOHSA could be supplemented by the general maritime wrongful death remedy recognized in *Moragne v. States Marine Lines.* Whether DOHSA preempts state wrongful death remedies was not addressed in the decision. Particularly in light of the interpretation of section 7 of DOHSA set forth above, *Higginbotham* cannot be extended to answer this question.

iii. *In Re S/S HELENA*

Air Logistics also points out that under this court's decision in *In Re S/S HELENA*, 529 F.2d 744, 753 (5th Cir. 1976), state statutes are preempted by the *Moragne* death remedy when death occurs within territorial waters. We agree that the anomaly of allowing state statutes to operate on the high seas but not in territorial waters is apparent. Air Logistics' argument has logic on its side, but again it does not take into account section 7. The general maritime law preempts state law, but DOHSA preempts the general maritime law, and, as explained, section 7 of DOHSA specifically saves state remedies.

iv. *Moragne v. States Marine Lines*

Air Logistics also asserts that section 7 was interpreted by the United States Supreme Court in *Moragne* and *THE TUNGUS v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959) as preserving the effect of

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called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. See nn. 6-10, supra. The Act does not address every issue of wrongful-death law, see e.g., n. 15 supra, but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

436 U.S. at 625, 98 S.Ct. at 2015, 56 L.Ed.2d at 587.

state statutes only within territorial waters. In the passages relied on by Air Logistics, however, the Court is simply quoting from the House and Senate reports on DOHSA.[15] With regard to the *Moragne* opinion in particular, this argument reflects a basic misunderstanding of the context in which the court used this language. The respondent in *Moragne* argued that since DOHSA applied only to deaths occurring more than a marine league from shore, it evidenced a congressional intent to withhold a federal wrongful death remedy within territorial waters. The Court quoted this legislative history in support of its conclusion that Congress did not extend DOHSA to territorial waters simply because state statutes already provided a remedy in that area. 398 U.S. at 395-97, 90 S.Ct. at 1784-85, 26 L.Ed.2d at 353-55.

In *THE TUNGUS*, the respondent argued that a New Jersey death statute should be applied in admiralty without regard to any of the procedural or substantive limitations New Jersey had placed on the right to recover. The Court noted that to accept this argument would be to infringe on the sovereignty Congress intended the states to retain over deaths in a state's territorial waters, and for this proposition quoted the congressional reports. *THE TUNGUS* does not consider the application of state statutes beyond territorial waters. From these sketchy references we cannot derive the conclusion that the Supreme Court has interpreted section 7 to preserve state remedies *only* within territorial waters. In addition, the language in the quoted House and Senate Reports de-

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[15] [DOHSA] would accomplish that result "for deaths on the high seas, leaving unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the states . . . this is for the purpose of uniformity, as the states cannot properly legislate for the high seas." S.Rep. No. 216, 66th Cong., 1st Sess., 3, 4 (1919); H.R.Rep. No. 674, 66th Cong., 2nd Sess., 3, 4 (1920).

398 U.S. at 397, 90 S.Ct. at 1786, 26 L.Ed.2d at 355; *see also THE TUNGUS*, 358 U.S. at 593, 79 S.Ct. at 507, 3 L.Ed.2d at 529.

scribes section 7 as it was constituted prior to the Mann amendment.

v. *Nygaard v. Peter Pan Seafoods*

We recognize that this holding places us in conflict with the Ninth Circuit. In *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983), the Ninth Circuit held that maritime uniformity required the conclusion that DOHSA preempts state statutes. The court stated: "If the federal remedial scheme for death within territorial waters takes precedence over state remedies, then certainly the federal remedial scheme for death on the high seas, where the primacy of federal interests is far clearer, should also take precedence." *Id.* at 80. The discussion of this issue in *Nygaard* does not mention section 7 of DOHSA; indeed we have no way of knowing that section 7 was brought to the court's attention.[16] In light of the interpretation of section 7 mapped out above, we disagree with the conclusion reached in *Nygaard*.[17]

Our holding in this case does not promote the uniformity in the maritime law which the Supreme Court has nurtured for many decades, and we may agree with our brothers of the Ninth Circuit that to have state law preempted in territorial waters yet operative on the high

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[16] The Ninth Circuit's holding in *Nygaard* was based on the "logical import" of its decision in *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980), that maritime uniformity requires preemption of state death statutes by the general maritime law. The result reached in *Nelson* is, of course, the same reached by this circuit in *In re S/S HELENA*, discussed *supra*.

[17] We also note that in *Barbe v. Drummond*, the First Circuit noted in dicta that section 7 could be interpreted to preserve state remedies, "but the better authority rejects this view [citing cases, including *Wilson v. Transocean Airlines*]." 507 F.2d at 801 n. 10. Again, as outlined above, the necessary interpretation of section 7 after the Mann amendment is that it allows state remedies to operate on the high seas. The *Barbe* footnote contains no analysis which undercuts this position.

seas is "a result as damaging to uniformity in wrongful death actions as it is illogical." 701 F.2d at 80. It is indeed profoundly unsettling that state law will have nothing to do with a claim for wrongful death which occurs on the Mississippi River, yet might apply to the death of an offshore worker forty miles from land, but this is the legacy of eighty-odd years of haphazard evolution in maritime wrongful death remedies. The remedy for wrongful death on the high seas under DOHSA has not changed since 1920, but remedies for maritime wrongful death occurring in inland waters have been altered almost beyond recognition. Prior to *Moragne* and *In Re S/S HELENA*, a straightforward interpretation of section 7 resulted in no anomaly—state statutes could apply in territorial waters, state statutes could apply on the high seas. Section 7 is simply out of sync with a changing jurisprudence. Nonetheless, *Higginbotham* teaches us that DOHSA must take priority over jurisprudential formulations, and this principle holds as true when the result is one we dislike as when it is one we applaud. If section 7 is to be molded to form a symmetrical whole with other developments in maritime wrongful death law, the artisan must be Congress and not this court.

We turn next to whether Louisiana has the authority to extend the coverage of its wrongful death remedy to the high seas and if so, whether it has elected to do so.

D. LEGISLATIVE JURISDICTION

Air Logistics argues that the states simply do not have the power to legislate with regard to occurrences outside their territorial boundaries. They contend that as a matter of federalism, "Louisiana can no more enact laws governing death on the high seas than it could enact laws governing deaths in Mississippi." This leads us into the relatively unexplored territory of legislative jurisdiction.[18] Many of the decisions which have consid-

[18] Simply stated, legislative jurisdiction is the power of a governmental body to apply its laws to create or otherwise affect legal

ered the question whether DOHSA preempts state statutes have glossed or failed entirely to discuss this critical question, and there is little solid, unambiguous precedent in this area which is of any help. After careful consideration, however, we conclude that in this respect Air Logistics paints with too broad a brush. There are certainly constitutional limits on a state's power to apply its laws to order the rights of individuals, but these limits are not determined entirely by geographic and territorial considerations.

From the time of *THE HARRISBURG* until the passage of the Death on the High Seas Act in 1920, state statutes afforded the *only* available remedy for deaths on the high seas. The case most often cited as authority for the use of state statutes in admiralty, both before and after the passage of DOHSA, is *THE HAMILTON*.[19] *THE HAMILTON* appeared to be based on the theory that the "law follows the flag"—the vessels, since they were owned by Delaware citizens, were part of the territory of Delaware regardless of their location [20]—but its discussion was not limited to that proposition. Justice Holmes initially addressed the power of the State of

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interests. It is to be distinguished from judicial jurisdiction, which is the bare power of a body to hear a case in its court system, regardless of the law applied. *See generally* Reese, *Legislative Jurisdiction*, 78 Columbia L. Rev. 1587 (1978). No question of Louisiana's judicial jurisdiction is presented by this case.

[19] E.g., *Alexander v. United Technologies Corp.*, 548 F.Supp. 139, 141 (D. Conn. 1982); *Safir v. Compagnie General Transatlantique*, 241 F.Supp. 501, 506-07 (E.D.N.Y. 1965); *THE JAMES MCGEE*, 300 Fed. 93, 96 (S.D.N.Y. 1923); *So. Pac. Co. v. DeValla Da Costa*, 190 Fed. 689, 692 (1st Cir. 1911).

[20] Long before *THE HAMILTON*, and indeed even before *THE HARRISBURG*, Judge Pardee of this circuit suggested that Article 2315 of the Louisiana Civil Code might be applied to a death occurring on a vessel owned by Louisiana citizens and based in Louisiana, on the theory that the vessel was a part of Louisiana's territory. *THE E.B. WARD, JR.*, 17 F. 456, 459-60 (C.C. La. 1883).

Delaware to make laws applicable to the high seas, and concluded that if there were no conflict with the Constitution, Delaware could make such laws. The Justice went on to conclude that when Congress was silent on the matter, there was no Constitutional bar to application of the Delaware statute to its own citizens on the high seas. 207 U.S. at 403-04, 28 S.Ct. at 133-34, 52 L.Ed.2d at 269.

In *Skiriotes v. Florida*, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941), *THE HAMILTON* was affirmed as standing for a considerably broader proposition than simply that the law follows the flag. Skiriotes was charged with violation of a Florida statute which prohibited the collection of sponges with diving equipment. At the time of the offense he was approximately two marine leagues off the shore of Florida. 313 U.S. at 70, 61 S.Ct. at 926, 85 L.Ed. at 1196. In response to Skiriotes' argument that Florida lacked the power to apply this statute outside territorial waters, Justice Hughes observed that "if the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest and where there is no conflict with acts of Congress." 313 U.S. at 77, 61 S.Ct. at 929, 85 L.Ed. at 1200. This principle was based in part upon *THE HAMILTON*, as Justice Hughes explained:

> [T]he principle recognized in *THE HAMILTON*, *supra*, was not limited by the conception of vessels as floating territory. There was recognition of the broader principle of the power of a sovereign State to govern the conduct of its citizens on the high seas. . . . When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is

> analogous to the sovereign authority of the United States over its citizens in like circumstances.

313 U.S. at 78-79, 61 S.Ct. at 930, 85 L.Ed. at 1201.[21]

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[21] More recent Supreme Court citations to *THE HAMILTON* are ambiguous. In *Rodrigue v. Aetna*, *THE HAMILTON* was cited for the proposition that had offshore oil rigs been treated as vessels, the admiralty law "supplemented by the law of the jurisdiction of the vessel's owner" would apply to them. 395 U.S. at 355, 23 L.Ed.2d at 364. In *Moragne v. States Marine Lines*, however, the Court noted that

> The general understanding was that the statutes of the coastal States, which provided remedies for death within territorial waters, did not apply beyond state boundaries. This court had suggested, in an early case where the plaintiff and defendant were of the same State, that the law of that State could be applied to a death on the high seas, if the state intended its law to have such scope. *THE HAMILTON* . . .

398 U.S. at 393 n. 10, 90 S.Ct. at 1784 n. 10, 26 L.Ed.2d at 352 n. 10.

These passing references may have some academic interest, but are of little relevance to the concrete issue we must decide.

It has been suggested that *THE HAMILTON* may have been implicitly overruled by *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), and *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921). See *Wilson v. Transocean Airlines*, 121 F.Supp. at 91-92; Comment, *Maritime Wrongful Death After Moragne: The Seaman's Legal Lifeboat*, 59 Geo.L.J. 1411, 1423-24 (1971). *Jensen* is a celebrated and forceful statement of the doctrine that the provisions of state law may not interfere with the essential unity of federal maritime law. *Garcia* approved the use of a state statute when a death occurred on navigable waters *within* a state's territorial waters on the basis that the action was "maritime *and local* in character," and did not significantly threaten this unity. The argument that the *Jensen* doctrine and the "maritime and local" dicta in *Garcia* limit the power of a state to apply its laws to a high seas death might have some force were it not for section 7 of DOHSA and *Skiriotes v. Florida*. We note as well that *Jensen* itself cites *THE HAMILTON* in support of the proposition that one of the areas in which the states may legislate without infringing on the necessary maritime uniformity is that of wrongful death. 244 U.S. at 216, 37 S.Ct. at 529, 16 L.Ed. at 1098. *See also Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 435-36, 96 S.Ct. 2140, 2153-54, 48 L.Ed.2d 736 (1976) (Stewart,

The statute involved in *Skiriotes* was criminal but Justice Hughes' interpretation of *THE HAMILTON* makes it clear that this analysis of legislative jurisdiction is equally applicable to wrongful death statutes. Florida's interest in protecting the sponge fishery, in the absence of conflicting federal law, was sufficient to allow it to order the conduct of its own citizens on the high seas. Given a sufficient interest in a wrongful death occurring outside its territorial waters, and absent conflicting federal law, it follows that a state may also constitutionally apply its own law to order the rights of its citizens with regard to that death.

We note that both *THE HAMILTON* and *Skiriotes v. Florida* are careful to limit their analysis to the power of a state to attach legal consequences to the acts of their *own citizens* on the high seas.[22] As *Skiriotes* expressly notes, "No right of a citizen of any other state is here asserted. The question is solely between appellant and his own state." 313 U.S. at 76, 61 S.Ct. at 929, 85 L.Ed. at 1200. Fortunately, we are not compelled to explore the outer limits of a state's legislative jurisdiction over high seas occurrences since the significant contacts in this litigation are exclusively with Louisiana. Offshore Logistics is a Louisiana corporation and the helicopter was enroute to Houma, Louisiana at the time of the crash. Both decedents were Louisiana residents, and their work ac-

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J., dissenting) ("The Court has never struck down a state law on the ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean 'territory.'")

[22] This is congruent with the conflict of laws principle that a state must have a sufficient interest in a particular transaction or occurrence to apply its own law. *Cf. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981); *Clay v. Sun Insurance Office*, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960); *Home Insurance Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930). *See generally*, Comment, *A Constitutional Analysis of the Mississippi Commercial Code Conflict of Laws Provision*, 53 Miss. L.J. 619 (1983).

tivities were centered around the Louisiana offices of the service companies by which they were employed. Both plaintiffs were also Louisiana residents at the time of the crash. In these circumstances, Air Logistics is clearly subject to the substantive law of Louisiana.

E. EXTRATERRITORIAL APPLICATION OF ART. 2315

What now remains is to determine whether as a matter of Louisiana law these plaintiffs have a claim under the Louisiana statute against this defendant. Article 2315 provides no clue as to whether it is intended to apply to deaths occurring on the high seas. Louisiana decisional law construing Article 2315 also furnishes no concrete guidance concerning whether that provision should have extraterritorial application. It is significant, however, that Louisiana will apply its tort law to an event or a transaction occurring in another state, if Louisiana has a sufficient interest in the transaction. *See Jagers v. Royal Indemnity Co.*, 276 So.2d 309, 313 (La. 1973); *Romero v. State Farm Mutual Automobile Insurance*, 277 So.2d 649, 651 (La. 1973). We also note that Louisiana applies its workmen's compensation law to employees meeting certain statutorily-defined conditions, even if the injury occurs in another state, a foreign country, or on the outer Continental Shelf. *See Thompson v. Teledyne Movible Offshore, Inc.*, 419 So.2d 822, 823-25 (La. 1982); La. Rev.Stat. 23:1035.1. Workmen's compensation statutes and wrongful death statutes, broadly speaking, have the same purpose: to insure that injured individuals or their survivors are compensated. There can be little doubt that Louisiana has a strong interest in seeing that the survivors of its citizens killed by the fault of another are adequately compensated. It is most reasonable, unless the Louisiana courts or legislature indicate a contrary intent, to assume that the state intended the protection of this law to extend to its constitutional limits. This is

particularly so when, as in this case, none of the considerations of comity which influence choice of law in the interstate context are present.

F. RIGHT TO JURY TRIAL

Both Taylor and Tallentire demand a jury trial on their claims under the Louisiana death act. Since Taylor and Offshore Logistics are both Louisiana residents, Taylor's state law claim is cognizable in federal court either as an admiralty action or as a pendent claim to her DOHSA action. Since, in either instance Taylor's case would be in federal court solely by virtue of admiralty jurisdiction, Taylor has no right to a trial by jury.[23]

Since Tallentire and Air Logistics are citizens of different states, trial by jury will be available to Tallentire on her Louisiana death action. This is so whether Tallentire's claims are considered as based solely on the Louisiana statute or based on DOHSA *and* the Louisiana statute.[24]

II. DAMAGES

The district court accepted the projections made by Air Logistics' economist in computing the future earnings of each of the decedents. Taylor and Tallentire both contend their respective awards were inadequate, and contend that the district court erred in a number of respects in computing the awards. Since Tallentire's damage claims must be presented to a jury, we address only Taylor's complaints.

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[23] *E.g., Green v. Ross,* 481 F.2d 102 (5th Cir. 1973), *cert. denied,* 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973); *Ashland Oil v. Third Nat. Bank,* 557 F.Supp. 862 (E.D. Ky. 1983).

[24] *See Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963), *Cruz v. Hendy Inter. Co.,* 638 F.2d 719, 723 (5th Cir. 1981).

A. Social Security Taxes

In computing future earnings, the defendant's economist deducted social security taxes for the decedent's life span. Taylor in essence argues that social security payments are similar to payments to a pension plan, and that in any case social security deductions are matched by the employer's contribution, so there is no net loss of income. Although this argument has a certain amount of superficial appeal, our cases establish that social security taxes should be deducted in computing future earnings. *See Culver v. Slater Boat Co.*, 688 F.2d 280, 302 (5th Cir. 1982), modified in other respects *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983); *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 479 (5th Cir. 1984).

B. Loss of Inheritance

The trial court also denied damages for loss of inheritance. This is a proper element of damages under DOHSA, *see Solomon v. Warren*, 540 F.2d 777, 790 (5th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *National Air Lines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959), *cert. denied*, 361 U.S. 885, 80 S.Ct. 157, 4 L.Ed.2d 121 (1960), but should be awarded only when there is "a reasonable expectation of pecuniary benefit" or a "probability" that the claimed inheritance would have come to the plaintiff. *Solomon*, 540 F.2d at 790-91; *see also Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d at 81. In *Solomon v. Warren*, several factors were considered in determining whether a reasonable expectation of pecuniary benefit was present: (1) the existence of a will; (2) the fact that plaintiffs were actually legatees in the will; (3) the plaintiffs would be entitled to take under intestate succession even in the absence of a will; (4) the decedent had a history of accumulating property. 540 F.2d at 791. Taylor introduced no evidence of these or other factors which would

establish a sufficient probability of inheritance. In light of this, the district court's denial of this item as too speculative was well within its discretion.

C. Loss of Services

The district court also denied Taylor damages for loss of the services of her husband, because no evidence of the value of those services was introduced. Taylor's testimony that the decedent routinely performed repair work on the home and repaired the family automobiles was not contradicted; indeed we note that the defendant's post-trial brief conceded the propriety of damages for loss of services, seeking only to limit the amount. Damages of this sort are, by nature, not calculable with absolute exactness, and there is some merit to Taylor's contention that an expert's valuation of those services would be little better than that of anyone else. We remand this element for reconsideration and without intimating that those cases furnish the proper measure of damages, commend to the district court's attention *Consolidated Machines Inc. v. Protein Products Corp.*, 428 F.Supp. 209, 230 (M.D.Fla. 1976), and the district court's opinion in *Higginbotham v. Mobil Oil Corp.*, 360 F.Supp. 1140, 1144 (W.D.La. 1973), *reversed on other grounds* 545 F.2d 422 (5th Cir. 1977), *reversed and remanded*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).

We have examined appellee's remaining assignments of error with regard to damages, and conclude that these decisions were within the trial court's discretion.

D. Cross Appeal by Air Logistics

Air Logistics has cross appealed, contending that the annual income figure used by the district court to calculate future earnings for Taylor was based on inadmissible testimony. A Mr. Verrett, the district manager of Halliburton, the decedent's employer, testified that figures supplied to him by the company showed that the

annual earnings of an employee in the positions to which the decedent would have been promoted were approximately $33,000 in 1981 and approximately $38,000 in 1982, including overtime. The base salary for employees in these positions was approximately $29,000 annually. Mr. Verrett also stated that he personally would have thought the figure would have been greater, perhaps $40,000 annually, but stated that any figure he gave would be a "guess." The district court used a $40,000 annual salary as the base for computing the decedent's future earnings. Air Logistics objects to the use of any figure other than the guaranteed salary testified to by Mr. Verrett, on the basis that the other figures are hearsay.

Whatever the merit of Air Logistics' argument that the figures supplied by Mr. Verrett are hearsay, the objection was not adequately preserved for appeal. Although Air Logistics' counsel made an initial objection that the average annual earnings of a special operator were not within Verrett's personal knowledge, plaintiff's counsel replied that he would "clarify that." Verrett then testified to the effect noted above, and defense counsel indicated no further objection to this testimony either then or in his cross-examination. The objection was never ruled upon, and Air Logistics' counsel indicated no dissatisfaction with the state of the record. Having given the trial court no reason to exclude this testimony as hearsay, the objection to the figures supplied by the company for base wages may not be pressed on appeal.[25] *Cf. Complete Auto Transit, Inc. v. Wayne Broyles Eng. Corp.*, 351 F.2d 478, 481-82 (5th Cir. 1965). We agree, however, that the $40,000 figure, which Mr. Verrett candidly stated was a guess, should not have been used to calculate the damage award. Use of a "guess" by a

[25] Since we remand for proceedings to determine other aspects of Taylor's damage award, the district court may wish to exercise its discretion to take additional evidence on this issue, if justice so requires.

witness as a basis for a damage award, when the witness himself states that other evidence is more accurate, is plain error affecting substantial rights. We therefore remand this aspect of Taylor's damage award for reconsideration by the district court.

CONCLUSION

The plain words of section 7 of DOHSA prevent the preemption by DOHSA of the Louisiana state death act. Our desire for a uniform, consistent, scheme of maritime death remedies cannot justify a refusal to follow the legislative will. We also conclude that Louisiana has the authority to apply its death act to its own citizens on the high seas adjacent to its shores and that as a matter of Louisiana law, plaintiffs may assert a claim under the Louisiana death act. Other than the amount of Taylor's annual earnings and the claim for loss of services by his survivors, we find no error in the trial court's computation of Taylor's award under DOHSA.

The judgment in *Taylor* is VACATED, however, for reconsideration of the above discussed items under DOHSA and for further proceedings necessary for the district court to consider plaintiff's claims for non-pecuniary losses under Article 2315 of the Louisiana Civil Code.

The judgment in *Tallentire* is VACATED and REMANDED for trial by jury.[26]

E. GRADY JOLLY, Circuit Judge, specially concurring:

I concur, but with no minor reservation. The result we reach in this case creates significant problems in the

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[26] All parties correctly assert that the district court should enter a judgment for a sum certain, rather than simply setting out the method by which damages are to be calculated. On remand, the district court should require the parties to provide the necessary assistance to permit it to enter judgments for a definite sum.

field of maritime law because it defies reason, runs contrary to principles of the general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas. Most of these problems are noted in Judge Davis' thorough and honest opinion.

Notwithstanding the powerful reasons exhorting a result opposite the one we have reached, the language of the statute is plain and clear that state remedies for deaths on the high seas are preserved and not federally preempted, and there is legislative history that clearly supports the plain meaning of the plain words of the statute. I therefore concur, but knowing that this result may create a mess in more than a few cases.

GARZA, Circuit Judge, dissenting.

I respectfully dissent.

The majority begins with the proposition that section 7 of the Death on the High Seas Act (DOHSA) is "broad enough on its face" to permit a state wrongful death action for deaths occurring on the high seas. Indeed, read in a vacuum, section 7 does allow for such a construction. When read in the proper historical perspective, however, I believe that the majority's construction of section 7 is flawed.

Historically, state wrongful death actions provided the remedy for deaths occurring on territorial waters. Functionally, there was no remedy for deaths on the high seas. The absence of any remedy for deaths on the high seas was the primary purpose for the enactment of DOHSA. *See Moragne v. States Marine Lines*, 398 U.S. 375, 398, 90 S.Ct. 1772, 1786, 26 L.Ed.2d 339, 355 (1970). "The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the

Act preempted the entire field, destroying the state remedies that had previously existed." *Id.* In other words, section 7 preserved the then existing state law remedies available for deaths on territorial waters. It did not then, and does not now, expand the exclusive remedy created by DOHSA.

I am also compelled to dissent for the reasons expressed by the Ninth Circuit in *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (1983), in which the court held that DOHSA preempts state wrongful death statutes. Under the majority's opinion, state law is preempted by general maritime law on territorial waters, but operative on the high seas. This result is "as damaging to uniformity in wrongful death actions as it is illogical." *Id.* at 80.

For the foregoing reasons, I would affirm the district court's holding that DOHSA provided Taylor and Tallentire their exclusive remedy.

DEATH ON THE HIGH SEAS ACT

46 U.S.C. §§ 761-767 (1982)

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 763a. Limitations

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in

admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

LOUISIANA CIVIL CODE ANNOTATED

Art. 2315. Liability for acts causing damages; survival of action

A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

C. (1) The right to recover damages to property caused by an offense or quasi-offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

(2) As used in this Paragraph, property damages may include expenses or monetary obligations necessarily incurred by the obligee on account of such offense or quasi-offense; however, if the obligee is survived by any beneficiary enumerated in the following Paragraph of this Article, such expenses or obligations shall be recoverable by said beneficiaries.

D. (1) The right to recover all other damages caused by an offense or quasi-offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of:

(a) The surviving spouse and child or children of the deceased, or either such spouse or such child or children;

(b) The surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and

(c) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(2) The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased.

(3) A right to recover damages under the provisions of this Paragraph is a property right which, on the

death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

E. As used in this Article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

Supreme Court, U.S.
FILED
AUG 16 1985
JOSE... L. JR.

No. 85-97

In The
Supreme Court of the United States
October Term, 1984

PETROLEUM HELICOPTERS, INC.,
Petitioner,

v.

CAROL T. SINCOX, individually and as natural tutrix of the minors, Byron Sincox, etc.,
Respondent.

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 16, 1985

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REASONS FOR DENYING THE WRIT

THE ORDER OF THE DISTRICT COURT STRIKING PLAINTIFF'S CLAIM UNDER THE LOUISIANA WRONGFUL DEATH STATUTE WAS NOT PROPERLY "IN" THE COURT OF APPEALS WHEN THE PETITION FOR CERTERIORARI WAS FILED IN THIS COURT.

In the district court, plaintiff sought certification of the court's interlocutory judgment for appeal under 28 U.S.C. 1292(b). (Appendix.) This request was denied by the district court, and plaintiff then sought appeal of the order under 28 U.S.C. 1292(a) (3). Defendant-petitioners in the appeal to the Fifth Circuit strongly urged that plaintiff-respondent's original appeal to the Fifth Circuit was outside the jurisdiction of the Court of Appeal. These arguments, however, were never addressed by the Fifth Circuit because prior to hearing the case on the merits, the Fifth Circuit remanded the case to the district court for reconsideration in light of its recent decision in *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274 (5th Cir. 1985).

The initial question which this Court must then decide is whether or not the original order issued by the district court was an appealable order and whether this case was properly "in" the Court of Appeals when the petition for certiorari was filed. See *United States v. Nixon*, 418 U.S. 688 (1974).

The order rendered by the district court was not a final judgment as contemplated by 28 U.S.C. 1291. Therefore, in order for this case to properly be "in" the Court of Appeals at the time of filing of the petition of certiorari, the appeal must fall within the categories specified in 28

U.S.C. 1292. The only possible category would be 28 U.S.C. 1292(a)(3) dealing with interlocutory decrees in admiralty cases. On appeal to the Fifth Circuit, defendant-petitioner argued in brief that plaintiff-respondent's appeal did not fall within 28 U.S.C. 1292(a)(3) because the order dealt with non-admiralty remedies. Plaintiff-respondent would now join with defendant-petitioner in agreeing that there is doubt that this Court has jurisdiction of an appeal of an interlocutory order denying a non-admiralty claim. The petition for certiorari should therefore be dismissed since the case was not "in" the Court of Appeals at the time the petition was applied for.

THE DECISION IN TALLENTIRE v. OFFSHORE LOGISTICS, INC., 754 F.2d 1274 (5th Cir. 1985) PROPERLY INTERPRETS SECTION 7 OF THE DEATH ON THE HIGH SEAS ACT.

The Death on the High Seas Act, 46 U.S.C. 761 et seq provides at Section 767:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

Prior to passage of the Death on the High Seas Act, Louisiana's wrongful death statute, La. C.C. 2315, had been applied outside the territorial limits of the State of Louisiana in *The E. B. Ward, Jr.*, 17 Fed. 456 (5th Cir. 1883). Additionally, other courts have recently held that the Death on the High Seas Act was not exclusive and that state wrongful death remedies were applicable and pre-

served by Section 7. See *In Re Complaint of Exxon Corp.*, 548 F.Supp. 977 (S.D.N.Y. 1982); *Alexander v. United Technologies Corp.*, 548 F.Supp. 139 (D. Conn. 1982); *Rairigh v. Erlbeck*, 488 F.Supp. 865 (D. Md. 1980); *Lowe v. Trans World Airlines, Inc.*, 396 F.Supp. 9 (S.D.N.Y. 1975); *Safir v. Compagnie Generale Transatlantique*, 241 F.Supp. 501 (E.D.N.Y. 1965).

In *Tallentire, supra,* the Fifth Circuit simply gave a reasonable interpretation to the black and white letter of the law contained in Section 7. The language of Section 7 of the Death on the High Seas Act is clear. If the statute was intended to allow state remedies only within the territorial limits of the states, then there was no need for the first sentence of Section 7. Plain words of the statute are ordinarily regarded as controlling, and the plain words of this statute would allow the wrongful death remedy of the Death on the High Seas Act to be supplemented by Louisiana's wrongful death act. See *Escondido Mutual Water v. La Jolla Indians,* — U.S. —, —, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984).

—o—

CONCLUSION

Certiorari should not be granted in this case because the case was not properly on appeal at the time the petition for certiorari was filed, and the decision upon which the remand was based, *Tallentire v. Offshore Logistics, Inc., supra,* is a correct interpretation of Section 7 of the

Death on the High Seas Act which does not require review by this Court.

Respectfully submitted,

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August 16, 1985

APPENDIX

WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
in Opelousas

SEPTEMBER 18, 1984

PRESENT: HON. JOHN M. SHAW, JUDGE, Presiding
....., Court Reporter
Mildred Baker, Minute Clerk

COURT OPENED: 9:30 AM COURT ADJOURNED: 11:00 AM

MINUTES OF COURT

CASE NO: 84-1051

SECTION O

CAROL T. SINCOX, ET AL VS. PETROLEUM HELICOPTERS, INC.

APPEARANCES

DANNY LIRETTE	FOR PLAINTIFFS
.....	FOR.....
VANCE E. ELLEFSON	FOR PETROLEUM HELICOPTERS, INC.
.....	FOR.....
.....	FOR.....
.....	FOR.....
.....	FOR.....
.....	FOR.....

CASE CALLED FOR

x Hearing on motions	FILINGS: .....
— Jury selection only	.....
— Trial with/without jury, ... day	.....
— Other	.....

PROCEEDINGS:	JURORS SELECTED & SWORN TO TRY CASE:
—Witnesses sequestered	(1).....
—Opening statement—plaintiff	(2).....
—Opening statement—defendant	(3).....
—Testimony & evidence for pltf., not concluded	(4).....
—Testimony & evidence for deft., not concluded	(5).....
	(6).....

—Rebuttal testimony & evidence, not concluded (7)..... (8).....
—Evidence closed (9).....
—Evidence left open for ..... (10).....
—Case argued (11).....
—Jury instructed (12).....
—Alternate Juror(s) excused (Alt).....
—Jury deliberations began at .... AM/PM (Alt).....
—Jury verdict returned at .... AM/PM (Alt).....
—Jury polled
—Case ruled on by the Court —See Below
—Case taken under advisement
—Briefing times—See Below
—Mistrial declared

VERDICT, RULING, COMMENTS:

Motion on behalf of Petroleum Helicopters for judgment on the pleadings argued, submitted and GRANTED as to Art. 2315 and Outer Continental Shelf Lands Act claims. Plaintiffs' remaining claims lie under DOHSA and the General Maritime Law. Counsel for plaintiffs conceded that there is no diversity and trial will be before the Judge, not a jury.

Plaintiff's request that the interlocutory judgment be certified for appeal under 28 U.S.C.A. 1292(b) is denied.

Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PETROLEUM HELICOPTERS, INC.,
Petitioner,

v.

CAROL T. SINCOX, individually and as natural tutrix of the minors, Byron Sincox, etc.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-97

PETROLEUM HELICOPTERS, INC.,
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v.

CAROL T. SINCOX, individually and as natural tutrix of the minors, Byron Sincox, etc.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY BRIEF

This reply addresses the jurisdictional issue raised by respondent. We also note that a petition for a writ of certiorari (No. 85-202) was recently filed in *Tallentire* v. *Offshore Logistics, Inc.*, 754 F.2d 1274 (5th Cir. 1985), which served as the basis for the Fifth Circuit's disposition of the instant case.

The Facts Relevant To Jurisdiction Under 28 U.S.C. § 1292(a)(3)

In this case respondent initially pleaded diversity jurisdiction as well as admiralty jurisdiction. R.E. 4.[1] By

[1] Citation is to the Record Excerpts filed in the court below.

her amended complaint, respondent withdrew her allegation of diversity jurisdiction (R.E. 8) because "there is no diversity of citizenship between plaintiff and defendant" (R.E. 39). On September 18, 1984, the district court granted petitioner's motion for judgment on the pleadings with respect to respondent's claims under Art. 2315 of the Louisiana Code and the Outer Continental Shelf Lands Act ("OCSLA"). Pet. App. 3a. Respondent's claims under the Death on the High Seas Act ("DOHSA") and general maritime law remained for trial by the court. *Id.*

On September 27, 1984, respondent appealed from the order dismissing her claims under OCSLA and Louisiana Code Art. 2315. The notice of appeal stated that respondent "brings this appeal pursuant to 28 U.S.C. 1292(a)(3) as an appeal from an interlocutory decree of the district court determining the rights and liabilities of the parties to admiralty cases." R.E. 69.

As respondent observes, petitioner questioned the jurisdiction of the court of appeals pursuant to § 1292(a)(3). The court of appeals, however, ruled that in *Tallentire* it had reached a result on the merits that was contrary to the district court's order in this case and remanded this case for reconsideration in light of *Tallentire*. Pet. App. 1a.

Section 1292(a)(3) Conferred Jurisdiction On The Court Of Appeals To Decide Respondent's Appeal

Respondent urges this Court to deny certiorari because, in respondent's view, there is "doubt" that the court of appeals had jurisdiction over respondent's appeal. Opp. 2. As we now show, however, admiralty is the exclusive jurisdictional font for respondent's claims, and the district court's order dismissing all of her claims for nonpecuniary damages was appealable under § 1292(a)(3).

Section 1292(a)(3) provides that:

> "[T]he courts of appeals shall have jurisdiction of appeals from * * * (3) Interlocutory decrees of such

> district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees have been allowed."

"In general, it may be said that whenever an order [in an admiralty case] dismisses a claim for relief on the merits it is appealable under § 1292(a)(3)." 9 J. Moore, *Moore's Federal Practice* ¶ 110.13[3], at 210 (2d ed. 1985). Accordingly, it is the settled rule in admiralty cases that "an order that dismisses on the merits one of several separate claims for relief is appealable under § 1292(a)(3)." *Id.* at 211 & n.10.[2] For example, in *Crews* v. *Arundel Corp.*, 386 F.2d 528 (5th Cir. 1967), the Fifth Circuit held that an order that dismissed Jones Act and unseaworthiness claims, while retaining jurisdiction over a maintenance and cure claim, was appealable under § 1292(a)(3), since the order had a " 'final and irreparable effect on the rights' of the appellant with respect to [the Jones Act and unseaworthiness] claims." *Id.* at 529. See also *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1199 n.1 (2d Cir.) (order dismissing one of three causes of action held appealable under § 1292(a)(3)), *cert. denied*, 404 U.S. 985 (1971). The Fifth Circuit has recently reaffirmed this rule, finding appellate jurisdiction under § 1292(a)(3) to be proper in a case where the district court had dismissed a plaintiff's cause of action for unseaworthiness but had left intact his claim for negligence. See *Aparicio* v. *Swan Lake*, 643 F.2d 1109, 1113 n.6 (5th Cir. 1981).

---

[2] By contrast, where the order "dismisses one or more counts based on different theories of recovery without resolving the underlying issue of liability"—*i.e.*, where the order does not foreclose recovery of any of plaintiff's claimed damages—it is not appealable under § 1292(a)(3). *Id.* at 211-12. In the instant case the order of the district court foreclosed plaintiff's claims for nonpecuniary damages.

The court below thus had jurisdiction over respondent's appeal. First, this is an "admiralty case" within the meaning of § 1292(a)(3). Respondent conceded in ¶ 7 of her amended complaint (R.E. 8) and in her opposition to petitioner's motion for summary judgment (R.E. 39) that there is no diversity of citizenship between herself and petitioner. Therefore, as the court below held in *Tallentire*, respondent's Louisiana wrongful death act claim is "in federal court solely by virtue of admiralty jurisdiction." 754 F.2d at 1287; Pet. App. 27a. Second, the district court's order dismissed on the merits "one of several separate claims for relief": respondent's claim for nonpecuniary damages. Because the order dismissing petitioner's wrongful death act claim had a "final and irreparable effect on the rights" of respondent to recover damages for her alleged loss of love and affection, service, consortium, and society, it fell squarely within the established scope of § 1292(a)(3).

The court of appeals, moreover, impliedly rejected the challenge to its jurisdiction. The court decided to remand the case for reconsideration in light of *Tallentire* rather than to dismiss the appeal, which it regularly does when it concludes that it lacks appellate jurisdiction under § 1292(a)(3). See, *e.g.*, *Alleman* v. *Bunge Corp.*, 756 F.2d 344 (5th Cir. 1984); *Borne* v. *A&P Boat Rentals No. 4, Inc.*, 755 F.2d 1131 (5th Cir. 1985); *Hollywood Marine, Inc.* v. *M/V Artie James*, 755 F.2d 414 (5th Cir. 1985). This distinction is clearly shown by the Fifth Circuit's decision in *In re Patton-Tully Transp. Co.*, 715 F.2d 219 (5th Cir. 1983), where the court held that the purported appeal under § 1292(a)(3) of one ruling was improper—and *dismissed* the appeal—but held that the appeal of another ruling was proper—and, after finding that the district court had erred on the merits of the issue, *remanded* that part of the case to the district court.

In sum, the court of appeals correctly concluded that it had jurisdiction over respondent's appeal; and hence this Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision below.

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